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ABSTRACT

A practical approach to the prevention of sexual harassment is considered, and a study of sexual harassment as perceived by victims, the courts, and the Equal Employment Opportunity Commission (EEOC) is presented. Attention is directed to the sociology of sexual harassment and to the following possible responses available to victims of harassment: acquiescing, declining but remaining silent, complaining through internal procedures, claiming unemployment compensation benefits after losing the job, pursuing state legal remedies, and filing a federal sex discrimination charge. Each possible response has negative consequences, and this places a victim in a double bind. Federal courts have addressed whether verbal and physical sexual advances are actionable under the central provision of Title VII of the Civil Rights Act of 1964. To understand the current position of the federal courts, some early and subsequent decisions are reviewed. The EEOC guidelines, which give a sweeping interpretation to the reach of Title VII in sexual harassment cases, are examined and sample policy statements prohibiting sexual harassment are presented. Attention is also directed to grievance procedures, sanctions, recordkeeping and reporting of sexual harassment, and students harassing students or employees. (SW)

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Sexual Harassment: An Employment Issue

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A CUPA MONOGRAPH
by
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CONTENTS

Part I — A Study of Sexual Harassment as Perceived by Victims, the Courts, and the EEOC

Introduction 1
The Sociology of Sexual Harassment 2
Alternative Responses Available to Victims of Harassment 6
Sexual Harassment as a Form of Employment Discrimination Under Title VII 14
The 1980 EEOC Guidelines 24
Conclusion to Part I 28

Part II — Sexual Harassment: A Practical Approach for Prevention

Introduction 31
Definitions 33
Policy Statements 34
Grievance Procedures 43
Sanctions 46
Recordkeeping and Reporting 47
Students Harassing Students or Employees 48
Training Programs 49

Notes 51

Appendix A: Sample Student Grievance Procedure 55
Appendix B: Sexual Harassment Case Studies 60
Appendix C: Bibliography-Materials on Sexual Harassment 62
Appendix D: Listing of Sexual Harassment Cases 68
Appendix E: EEOC Guideiines on Sexual Harassment 71

SEXUAL HARASSMENT: AN EMPLOYMENT ISSUE

PART I — A STUDY OF SEXUAL HARASSMENT AS PERCEIVED BY VICTIMS, THE COURTS, AND THE EEOC

INTRODUCTION

After prolonged debate and compromise, Congress passed Title VII of the Civil Rights Act of 1964 prohibiting various forms of employment discrimination.[1] Congress later expanded the reach of Title VII and increased the authority of the Equal Employment Opportunity Commission (EEOC) by passing the Equal Employment Opportunity Act of 1972.[2] The EEOC has congressional authority to enforce Title VII, but the federal courts have jurisdiction to hear claims brought under Title VII once the EEOC has investigated them. Although Title VII has been in effect for a full 16 years, there are still major differences in the interpretation given to Title VII by the courts and the EEOC.

A specific battle seems to be developing in a relatively new area of litigation under Title VII — the sexual harassment of employees. The federal courts have generally taken a restrictive approach to what types of sexual harassment, if any, are covered by Title VII. The EEOC, on the other hand, has taken an expansive approach to an employer's liability for the sexual harassment of its employees. Both the courts and the EEOC purport to be following congressional intent in their interpretation of Title VII as it relates to sexual harassment.

Before examining the substantive disagreements between the courts and the EEOC, it is important to understand the sociology of sexual harassment and to identify the alternative responses available to victims of harassment, other than a Title VII lawsuit.

THE SOCIOLOGY OF SEXUAL HARASSMENT

The Nature of the Problem

Two types of workplace sexual harassment are distinguishable. The first simply involves unwanted sexual attention from supervisors, subordinates, co-workers, or even non-employees, that is personally offensive to the victim. Here the harassment is not directly connected to an employment decision involving the victim. Examples of the first type of harassment range from making suggestive comments and telling dirty (off color) jokes, to causing unnecessary touching, or being physically aggressive. Such harassment may be discreet or very open, may be perpetrated by one individual or by a group, and may involve one incident or repeated conduct.

The second type of harassment involves sexual advances made by a supervisor with the stated or implied threat that rejection of such advances will adversely affect the victim's employment. Central to this type of harassment is the element of power — the existence of an employment reprisal available to the supervisor. The reprisals may include a failure to promote the employee, disapproval of travel or training requests, and actual dismissal.

Both types of sexual harassment present barriers to the victim's full participation in the workforce by creating a stressful and often intolerable work environment. Today employers may be held liable under different standards for allowing either type of harassment to occur. It should be made clear that both males and females can be victims, and likewise, both males and females can be guilty of harassment. Due to the magnitude of male-initiated harassment incidents, this discussion treats sexual harassment from the perspective of a male harasser and a female victim.[1]

Historical Perspective

Although employer liability for sexual harassment is a new legal development, making job security dependent upon acquiescence to sexual demands or tolerance of sexual harassment is not a new phenomenon. According to research by Mary Bularzik, sexual harassment was a problem faced by paid women

workers in the United States as early as colonial times. Bularzik documents the personal experiences of a wide range of women and reveals a startling pattern of violence and employment discrimination that included sexual harassment:

> In the late 19th and early 20th centuries, the increasing participation of women in the labor force went along with the pattern of segregation into low-paying jobs . . . . One would expect to find many instances of sexual harassment in this period. And indeed we do. The most common description of the harassment victim at that time was — young, single, immigrant, uneducated, and unskilled. This is of course also the description of the typical woman worker. The severity of abuse ranged from verbal suggestions, threats and insults, to staring, touching, attempted rape, and rape.[4]

Many of these women perceived sexual harassment as an individual problem — it was one's personal bad luck to have a lecherous boss or co-workers. Seeing it as an individual problem led to emotional reactions, including guilt, fear, anger, shame, confusion, and an overwhelming sense of powerlessness. For these women tolerating the harassment or quitting and facing unemployment seemed to be the only alternatives.

Other women perceived such harassment as a social problem; this perception led to group responses, such as organizing unions, forming protective associations, or establishing settlement houses. The group response also fostered attempts to achieve legal protection for women workers related to general working conditions, such as maximum hours, minimum wages, nightwork limitations, meal periods, and occupational safety and health measures. This initial move for protective legislation for women workers came before the Civil War and was reactivated before the 1870s. Yet it was not until the early 1900s that the U.S. Supreme Court upheld the principle of protective legislation for women workers.[5] However, no attempt was made to address the particular problem of workplace harassment through legislation.

The recent women's movement and the dramatic increase in the number of women in our national workforce have generated an expanded concern for equality in the workplace. The 1970s witnessed the creation of organizations whose specific purpose is to publicly and directly attack the problem of sexual harassment

and offer support services to victims. Two such organizations, Working Women's Institute (formerly Working Women United Institute), founded in 1975 and based in New York, and Alliance Against Sexual Coercion, founded in 1976 and based in Boston, have been successful in focusing national attention on the seriousness and scope of the harassment problem and are active lobbyists for legislative action in this area.[6]

The Extent of the Problem

How widespread is the problem of sexual harassment? In 1975, the Working Women's Institute (WWI) surveyed a small group of women in upstate New York and found that 70 percent of the sample group had experienced sexual harassment at least once.[7] In 1976, *Redbook* magazine published a questionnaire entitled, "How Do You Handle Sex on the Job?" and received over 9,000 responses. Nearly 90 percent of the women responding to the *Redbook* survey said they had experienced one or more forms of unwanted sexual attention on the job. Nearly 50 percent said that they or someone they knew had quit or had been fired because of harassment.[8]

In 1980, as a result of an investigation conducted by a House of Representatives committee, the Merit Systems Protection Board undertook the first comprehensive study of sexual harassment in the federal government. The Board had questionnaires mailed to 23,000 male and female employees. About 85 percent completed the survey. Nearly half the women (42 percent) and 17 percent of the men responding indicated they had experienced sexual harassment on the job.[9]

Allowing for the fact that those who have experienced some form of sexual harassment are more likely to respond to such surveys, thereby somewhat skewing the sample, these statistics are startling. From the amount of attention being given to the subject in periodicals — ranging from *Ms.* to *Time* and from *Mother Jones* to *Business Week*, as well as in the recent film, "9 to 5" -- it seems clear that sexual harassment is perceived as a serious sociological problem.[10] The Working Women's Institute handles hundreds of inquiries concerning sexual harassment each month and has concluded that sexual harassment is so common that it has until recently been accepted as an inevitable condition of women's employment.[11]

Psychological Perspective

If sexual harassment of employees has been a constant problem for two centuries and affects a large percentage of women workers, why hasn't more corrective action been taken? Bularzik's explanation underscores the psychology of harassment.

> The 19th century ideal of True Womanhood required women to be the guardians of purity; if a sexual episode occurred, it was the woman's fault, and she was 'ruined for life.' In practical terms, this meant she might be thrown out of her job and house. Ladies were not to know even of the existence of sexual passion. To admit that sexual contact, even conversation, occurred, was to be blamed for it. Thus, the double bind — while women workers were often at the mercy of male supervisors, the repercussions of admitting incidents happened were often as bad as the original event. This conflict between the 'lady' or 'good girl' who is above sexuality, and the 'bad girl' or 'whore' who is involved with it, is a major theme in the history of sexual harassment.[12]

The trap of self-imposed silence described by Bularzik evidently has continued to the present day. The WWI survey found that of the women who had experienced sexual harassment, only 18 percent had officially complained. The most common reasons given for not reporting the incidents were that the victims believed nothing would be done, that the complaint would be treated lightly, or that the victims would be blamed or suffer repercussions.[13]

Similarly, the *Redbook* survey indicated that women still do not feel free to complain about sexual harassment.

> An overwhelming majority feel helpless in the face of sexual harassment. If they were to report it, only one in four expect that the man would be asked to stop — or else. Most think there'd be a negative reaction, that a supervisor would treat it as trivial, do nothing at all about it or even label the woman a 'troublemaker.'[14]

The Association of American Colleges' "Project on the Status and Education of Women" released a report on sexual harassment in 1978 and reached the same conclusion.

> Because of a long history of silence on the subject, many women feel uncomfortable, embarrassed, or ashamed when they talk about personal incidents of harassment. They are

> afraid that it will reflect badly on their character, or that they will be seen as somehow inviting the propositions . . . . When women *do* speak out they are often ignored, discredited, or accused of 'misunderstanding' their supervisor's intentions.[15]

From the foregoing description of the sociology of sexual harassment, it seems clear that the problem is pervasive and serious. Although harassment is by no means a new issue, the willingness of women to discuss openly their experiences and to take action, either alone or collectively, is a new dimension. Now that the existence of sexual harassment on the job has become part of our public consciousness, attention is being focused on alternative responses to the problem — including the proper role of the "law."

ALTERNATIVE RESPONSES AVAILABLE TO VICTIMS OF HARASSMENT

Six general responses to sexual harassment are identifiable: acquiescing, declining but remaining silent, complaining through internal procedures, claiming unemployment compensation benefits after losing the job, pursuing state legal remedies, and filing a federal sex discrimination charge. Each possible response has negative consequences, and this places a victim in a double bind. An examination of each possible response underscores the complexity of the problem.

Acquiescing

Some women go along with co-worker harassment or acquiesce to a supervisor's sexual demands out of a feeling of helplessness. They feel that if they complain, they will lose their jobs and be unable to find other employment. Other women acquiesce to sexual harassment because of a fear of physical harm.

Arguably, some women use acquiescence to a supervisor's sexual advances to their benefit and willingly submit to the advances. Thirty percent of the women responding to the *Redbook* survey acknowledged that they used their sexual attractiveness to gain some job advantage.[16] Other women indicated that they haven't used it deliberately, but are aware that their sexuality has helped them to win a job or promotion.[17]

However, sex on the job usually results in nothing more than short-term promotion and can easily result in long-term disappointment. For the woman who does give in to sexual demands, things will usually get worse. Once a supervisor's demands have been met, he is often eager to be free of the relationship and free to begin harassment of another victim. Accounts of sexual harassment support the conclusion that the harassment constitutes a pattern of behavior and is a manifestation of the harasser's need for power — not for sexual satisfaction.

> Unless you're one of the great courtesans of history . . . you'll lose out. For the average young woman — well, you're not going to end up marrying the boss. When the affair is over you will be a great embarrassment to him; he'll fire you.[8]

Declining But Remaining Silent

Declining a supervisor's sexual demands has its disadvantages as well. If a woman confronts the harasser after the first evidence of harassment, she can face the humiliation of being told "not to flatter herself" by imagining that she was being propositioned. If a woman tries not to over-react and attempts to ignore the early warning signs, she can find herself accused of "asking for it" when more substantial demands are made.

If a woman doesn't respond directly to the advances, the stress resulting from efforts to cope with the situation can lead to inferior job performance. On the other hand, a supervisor whose advances have been rejected may become overly critical and find fault with work previously deemed acceptable.

If a woman initially remains silent and does not complain to a higher authority until the situation is unbearable, she may find that her credibility is seriously impaired by the delay. A woman who quits her job rather than subject herself to continued harassment must realistically expect a poor recommendation when she seeks her next job.

Complaining Through Internal Procedures

When attempts to confront the guilty supervisor, or to ignore him, fail to achieve a satisfactory resolution of the problem, the woman's next alternative may be to lodge an internal com-

plaint. Whether the complaint is filed formally or informally depends on available grievance procedures and the complainant's preference.

Sexual harassment is an explosive issue, and university administrators, as well as personnel officers, are often uncomfortable dealing with the problem. When a woman does complain to the personnel office or the supervisor's boss, it is often a case of the woman's word against that of the harasser. Too frequently, the result has been that the harasser is given the benefit of the doubt without an adequate investigation of the complaint. Or a woman may find that her behavior is characterized as an hysterical overreaction.[19] In addition, the victim may be criticized for not trying to handle the problem herself. Effective internal grievance or complaint procedures are critical to a proper handling of sexual harassment charges.

For suggestions regarding the development of such internal procedures, consult PART II of this monograph.

Claiming Unemployment Compensation Benefits

Some women will choose to quit their jobs before filing an internal complaint or after filing a complaint, if it fails to correct the problem. Other women may find themselves fired for failing to acquiesce to sexual harassment and will consider filing an internal complaint to be fruitless. Such a woman's next alternative may be to file for unemployment compensation.

If a woman can prove that she has been *fired* for rejecting sexual advances, she will generally be entitled to receive unemployment compensation benefits. However, her employer has undoubtedly listed some other reason as justifying her discharge. The employer has the burden of establishing that the firing was for good cause. The woman will be given the opportunity to prove that the reason listed is a pretext and that sexual harassment was the real cause of her discharge. The claimant's burden of proof is hard to satisfy, as demonstrated in the case of *Hamilton v. Department of Industry, Labor, and Human Relations* (DILHR).[20]

The DILHR Hearing Examiner had found that Hamilton's employer, Appleton Electric Co., had discharged and refused to reinstate Hamilton because of her rejection of sexual advances made by her supervisor and the company's personnel manager.

However, the full DILHR Commission found that Hamilton had failed to establish by a preponderance of the evidence that the employer's agents had ever linked their sexual advances to threats of discharge if she did not respond favorably. Instead, the Commission found that Hamilton was terminated because of her failure to notify her employer for three consecutive days that she was unable to work. At the time, Hamilton was in a body cast because of a work-related back injury. Hamilton appealed her case to the state Circuit Court and the state Supreme Court, but was denied any recovery. That final decision came seven years after Hamilton filed her initial complaint.[21]

If a woman *quits* her job because of harassment and applies for employment compensation, she may have to prove more than the fact that she was sexually harassed. The following case involving a university employee is a good illustration.

> In New York, Carmita Wood, an administrative assistant at a university and sole support of two children, quit her job because her supervisor's frequent obscene gestures and lascivious looks had brought on tension cramps in her neck. Wood was denied unemployment benefits, even though two witnesses testified in her behalf. The hearing officer didn't doubt that the harassment had occurred; he simply dismissed its importance. He said she left her job without good reason.[22]

Efforts are being made to ease the way for women who quit their jobs because of sexual harassment to receive unemployment compensation. Legislation introduced in the New York state legislature would define harassment on the basis of age, race, creed, color, national origin, sex, or disability as "good cause" to leave one's job voluntarily and still collect unemployment benefits.[23] The WWI helped to develop this proposed legislation and has actively supported it. The WWI believes that passage of this amendment to the Unemployment Insurance Law would.

1. Extend to unemployment law protection already provided these groups under civil rights law;
2. Give recognition to the reality that harassment of workers in these categories is a widespread and serious problem that creates intolerable working conditions;
3. Signal those who administer the unemployment law that charges of harassment must receive the strictest scrutiny;
4. Shift the burden of proof from the claimant to the employer.[24]

The Wisconsin legislature has already acted to ameliorate the unemployment burden carried by a victim of harassment. In the past, state unemployment claimants on occasion have argued successfully that a job-contingent sexual advance is "good cause" for abandoning employment. Before this legislation was passed, however, there had been no guarantee that the Unemployment Compensation Board would find such harassment to be good cause, even when the fact of sexual harassment was not in dispute. Under the new Wisconsin guidelines, the Board's inquiry is narrowed by law. Once the victim has established the fact of harassment, she is automatically entitled to unemployment benefits.[25]

More and more states are following the route of considering sexual harassment to be good cause for abandoning employment — even without legislation. In California, for example, Nancy Fillhouer was granted unemployment benefits based on her claim that she had quit her job because of her employer's constant "insinuations, advances, pressures, verbal and physical indignities and liberties sexual in nature and the assault on her dignity sustained on an almost daily basis."[26] The Hearing Referee believed the claimant, but denied the claim and suggested that today's modern world requires that females in industry and business have a little tougher attitude toward life in general.

The Appeals Board reversed, finding that good cause to leave work may exist where the "conditions of employment are so onerous as to constitute a threat to the physical or mental well-being of an employee or where the actions of a supervisor are particularly harsh or oppressive."[27]

Overall, receiving unemployment compensation benefits after having been fired for refusing sexual advances or after having quit because of sexual harassment, is far from a sure thing and at best offers only partial compensation. Benefits are limited in amount and duration, and the victim is nevertheless out of a job and forced to explain the circumstances of leaving her former job to all prospective employers.

Pursuing State Legal Remedies

Since even receiving unemployment compensation benefits is likely to be insufficient, a victim of sexual harassment may wish to pursue one of several state legal options. She can press

civil or criminal assault or assault and battery charges, or charges of attempted rape or actual rape individually against the harasser.[28] In a 1980 civil case involving the president of World Airways, the jury awarded the complainant $52,500 in damages for the assault she claimed she was subjected to.[29]

Other state law options include suing the harasser or the employer for such tort or contract claims as intentional infliction of emotional distress or interference with an employment contract. In cases where a woman claims she has suffered psychologically as a result of sexual harassment at work, she may be able to file for worker's compensation benefits under state laws that permit claims for "psychological trauma" or "continuing stress or strain."

Research into sexual harassment lawsuits based on tort or contract causes of action uncovered references to several such cases.

In *Monge v. Beebe Rubber Company* (1974), the plaintiff claimed that she had been harassed by the foreman because she refused to go out with him and this ultimately resulted in her being fired.[30] The Supreme Court of New Hampshire held that the evidence supported the jury's verdict that the defendant employer, through its agents, acted maliciously in terminating the plaintiff's employment and thus had violated her oral employment contract. The court held, however, that damages for mental suffering are not generally recoverable in a contract action and that the plaintiff was not entitled to recover the full amount of damages awarded her by the jury. The plaintiff was entitled to recover any actual damages she had suffered from the breach of her employment contract.[31]

In a common law action for damages filed in the Alaska Supreme Court in 1975, there was an out-of-court settlement paid to a woman who was fired for resisting sexual advances by the manager of the radio station where she worked.[32] Still pending is the case of *Fuller v. Williams*, a common law action for slander, outrageous conduct, and unpaid wages filed in the Circuit Court of Oregon.[33] Also pending is the case of *Peter v. Aiken, et al.*, an action filed in the Superior Court of New Jersey for damages resulting from assault, battery, false imprisonment, libel, negligence, infliction of emotional distress, and violation of plaintiff's constitutional rights.[34] The paucity of contract or tort

actions for sexual harassment indicates that it is considered difficult to prevail on such claims and that the damages awarded may be insufficient to justify the litigation.

In the last several years a major development in the area of sexual harassment remedies has been the move to include a specific prohibition against sexual harassment in state civil rights laws or to interpret existing law as covering acts of sexual harassment.

Wisconsin led the way in 1978. It passed legislation holding an employer who makes job-contingent demands upon an employee subject to Wisconsin's Fair Employment Act.[35] Under this legislation, employees suffering harassment by an employer are able to have their complaints investigated by the Equal Rights Division of the state's Department of Industry, Labor, and Human Relations. The Division can order an offending employer to cease the conduct and grant back pay or other job benefits denied the employee because of a refusal to submit to a sexual demand.[36]

According to the sponsor of the legislation, State Representative James Rutkowski, "This legislation is a strong message to employers that this state will not tolerate sexual harassment of employees. It is an important message to employees as well — 'You have a right to complain.' "[37]

In July 1980, Governor Milliken of Michigan signed into law an amendment to the Michigan Civil Rights Act that provides a broad prohibition against sexual harassment.

> Discrimination because of sex includes sexual harassment, which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when: (i) submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain employment . . . (ii) submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment . . . (iii) such conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.".

This legislation codified the interpretation of state law previously adopted by the Michigan Civil Rights Commission. The Commission was faced with its first case alleging sexual harassment in October 1979. *In the Matter of Tyamie Hanson v. Haspor's Sav-Mor Market*, the Commission found as a matter of state law that sexual harassment of employees that affects such employees as a term or condition of employment is illegal discrimination.[39]

In a subsequent case, the Commission found that an employer was liable for the sexual harassment of an employee by co-workers. *In the Matter of Lynn Thomas v. Capitol Area Transportation Authority*, the Commission ordered the employer to reinstate the claimant with back pay and full seniority. The company also had to pay the claimant $1,000 in compensatory damages for the mental anguish she suffered.[40]

In the Commission's most recent decision involving sexual harassment, *In the Matter of Augustine Petro v. United Trucking Company, Inc.*, the employer was ordered to reinstate the claimant with back pay and seniority and to pay her $7,500 in compensatory damages for the mental anguish she suffered as a result of harassment by her supervisor.[41] The Commission found that the supervisor had, without invitation or encouragement, on more than one occasion, touched the claimant's breasts and buttocks, and had repeatedly hugged, tickled, and fondled the claimant.[42]

Minnesota has not amended the Minnesota Human Rights Act to add a specific prohibition against sexual harassment, but the Minnesota Supreme Court has interpreted the Act's general prohibition against sex discrimination to cover such conduct. In *Continental Can Co. v. State of Minnesota*, decided in June 1980, the court held the employer liable for verbal and physical sexual harassment directed at an employee by fellow employees.[43] The court ordered the company to pay the claimant $5,000 in damages and back pay, but did not require the company to reinstate the claimant.[44]

For victims of harassment in states with strong civil rights acts and strong civil rights commissions or fair employment practice laws or agencies, bringing a state action may be a viable option. However, state courts are typically conservative in awarding damages.

Thus far the advantages and disadvantages of five alternative responses to workplace sexual harassment have been analyzed. Each response has unsatisfactory aspects and fails to provide complete compensation to a victim of harassment. One important legal alternative remains — bringing a federal charge of discrimination against the employer for sexual harassment. This is potentially the most powerful response.

SEXUAL HARASSMENT AS A FORM OF EMPLOYMENT DISCRIMINATION UNDER TITLE VII

During the past six or seven years, some women who have suffered sexual harassment have brought suit against their employers, charging them with sex discrimination in violation of Title VII of the Civil Rights Act of 1964. Federal courts have therefore had to address the specific question of whether verbal and physical sexual advances are actionable under the central provision of Title VII, §703(a), which states:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.[45]

The decisions reached by the first district courts to consider this question were inconsistent, but suggested that Title VII did not reach such conduct.[46] In fact, several courts found that sexual harassment did not constitute sex discrimination at all. These courts were troubled particularly by the practical effects of deciding that a cause of action existed for situations the courts preferred to dismiss as unfortunate personal encounters.[47] Another issue troubling these courts was whether harassment by a supervisor could be imputed to the employer in order to find the employer liable.[48]

Additional district courts and several courts of appeal have since considered these issues and articulated a general standard

for determining when sexual harassment is discrimination based on sex. These courts have persuasively refuted the arguments against finding harassment actionable that were proffered in the early district court opinions.[49]

To understand the current position of the federal courts, it is necessary to review some of the early decisions and examine their reasoning in contrast to subsequent decisions.

Is it Sex Discrimination?

A fundamental argument against finding conduct actionable under Title VII suggests that a practice does not amount to sex discrimination unless sex is the sole basis for the discriminatory conduct. If an element in addition to sex is a factor in the treatment of the individual, the argument maintains, that person cannot claim discrimination. Accepting this analysis, the court in *Barnes v. Train* (1974) concluded: "The substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor."[50]

At one time, courts did allow a "sex-plus" analysis to defeat a sex discrimination cause of action. In 1969, the Fifth Circuit Court of Appeals in *Phillips v. Martin Marietta Corp.* upheld a finding that there was no discrimination when a woman was refused employment because she had preschool-age children. This conclusion was reached in spite of the fact that men with preschool-age children were not refused employment.[51] The Supreme Court in 1970 invalidated the analysis of the Fifth Circuit and found that "sex-plus" discrimination was as invidious as sex discrimination alone.[52] This principle has since been recognized by courts that have prohibited such disparate treatment as requiring female flight attendants, but not male flight attendants, to remain unmarried, and excluding unwed mothers from employment, but not unwed fathers.[53]

> Although the paradigm case of sex discrimination occurs when sex itself as a broad generic classification is the sole basis for an employer's proscribed practices, as when an employer refuses to hire any women for a certain position, the courts have judicially construed discriminatory acts to include classification on the basis of sex plus one other ostensibly neutral characteristic.[54]

In *Williams v. Saxbe* (1978) the court found that the additional factor of sexual consideration did not differ from the additional factors of marriage or preschool-age children. "It was and is sufficient to allege a violation of Title VII to claim that the rule creating an artificial barrier to employment has been applied to one gender and not to the other."[55]

Related to the "sex-plus" argument is the contention that for an employer to be guilty of discrimination based on sex, all employees of a particular sex must be subjected to the offending behavior or rule. The court in *Barnes v. Costle* (1977) summarily rejected this argument. "A sex-founded impediment to equal employment opportunity succumbs to Title VII even though less than all employees of the claimant's gender are affected."[56]

The fact that the harassment could as easily have been directed at males is another suggested basis for concluding that sexual harassment is not a discriminatory practice based on sex. Such a "bisexual" argument was accepted in *Corne v. Bausch & Lomb, Inc.* (1975) and by the lower court in *Tomkins v. Public Service Electric & Gas. Co.* (1976). The courts ruled, respectively:

> It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act because to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit.[57]

> In this instance the supervisor was male and the employee was female. But no immutable principle of psychology compels this alignment of parties. The gender lines might as easily have been reversed, or even not crossed at all. While sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse.[58]

It is true that once a policy is applied equally to males and females there is no sex discrimination, regardless of how offensive the policy is and regardless of whether the conduct inherently involves sex or sexual activity. "Nevertheless, without evidence that male employees are subjected to the same type of harassment, the argument becomes pointless. It is no answer to a charge of discrimination that under other circumstances the conduct complained of would be non-discriminatory."[59]

Relegating this "bisexual" argument to a footnote, the *Williams* court (1978) acknowledged that "a finding of discrimination could not be made if the supervisor were a bisexual and applied this criteria (acquiescence to sexual demands) to both genders." However, the court stated that this did not mean that sex discrimination did not occur when in fact only one gender was subjected to the sexual demands of a heterosexual or homosexual supervisor.[60]

As a corollary to the bisexual argument, the defendants in *Williams* argued that Title VII prohibits only those practices that discriminate on the basis of characteristics peculiar to one gender.[61] Only a few immutable gender-based characteristics that might affect employment have been identified — pregnancy, beards, breasts, and sex organs. To restrict the application of Title VII to discrimination based on these characteristics would "render it virtually meaningless."[62]

Ironically, courts that have dealt with such immutable characteristics have reasoned that there is no discrimination as long as persons of one sex are not treated differently from "similarly situated" persons of the other sex.[63] This analysis ignores the point that a "similarly situated" person of the other sex may not exist.

Such was the problem with the decision in *General Electric Co. v. Gilbert* (1976), where the Supreme Court held that excluding pregnancy from disability insurance coverage was not discrimination based on sex. The Court reasoned that there was no risk from which men were protected and women were not — that is, persons of one sex were not treated differently from similarly situated persons of the other sex. Congress expressly rejected this "immutable characteristics" argument as applied to pregnancy by passing the Pregnancy Disability Act mentioned earlier.[64] Nor does this argument seem to have much judicial support:

> It seems reasonable to conclude that sex discrimination will be found not when there is differential treatment based on immutable characteristics, but only in those instances when the practice could affect both sexes but is, in fact, being imposed on only one . . . . Sexual harassment certainly satisfies this test.[65]

Unlawful Conduct or Just Unfortunate Behavior?

The first few federal court opinions dealing with sexual harassment under Title VII evidenced a genuine reluctance for the law to become involved in what they viewed as a natural part of life with which the courts should not interfere. The lower court in *Tomkins* asserted:

> Title VII was enacted in order to remove those artificial barriers to full employment which are based upon unjust and long-encrusted prejudice. . . . It is not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley . . . . The abuse of authority by supervisors of either sex for personal purposes is an unhappy and recurrent feature of our social experience.[58]

The lower court in *Miller v. Bank of America* (1976) was cautious in admitting that there might be situations in which sex discrimination could be found:

> The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions. Such being the case, it would seem wise for the courts to refrain from delving into these matters short of specific factual allegations describing an employer policy which in its application imposes or permits a consistent, as distinguished from isolated, sex-based discrimination on a definite employee group.[59]

The court in *Corne* (1975) held that plaintiffs failed to state a claim for relief under Title VII, since the defendant's conduct appeared "to be nothing more than a personal proclivity, peculiarity, or mannerism."[60] The lower court in *Barnes* (1974) granted the defendant summary judgment and held: "This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it doesn't evidence an arbitrary barrier to continued employment based on plaintiff's sex."[61]

The argument that sexual harassment is simply an unfortunate social experience is reinforced by the argument that to consider it otherwise could inundate the federal courts. The *Corne* court (1975) stated:

> Also, an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time an employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.[70]

The lower court in *Miller* (1976) echoed this concern:

> In addition, it would not be difficult to foresee a federal challenge based on alleged sex motivated considerations of the complainant's superior in every case of a lost promotion, transfer, demotion or dismissal. And who is to say what degree of sexual cooperation would found a Title VII claim? It is conceivable, under plaintiff's theory, that flirtations of the smallest order would give rise to liability.[71]

The lower court in *Tomkins* (1976) was equally concerned with opening "the floodgates":

> If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with a subordinate of either sex. An invitaton to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time . . . . [We] would need 4,000 federal trial judges instead of some 400.[72]

In response to this concern about the potential large number of claims, the court in *Corne* (1975) suggested that to be actionable, the harassment has to "arise out of company policy," or result in some advantage to the employer. But this analysis has been squarely rejected.

> This observation cannot withstand even the most cursory analysis; by requiring that an employer benefit from discrimination before it can be found actionable, it would seem to suggest that actionable discrimination is a profitable therefore rational practice. Most employment discrimination seems to occur not as the result of a reasoned decision to adopt a beneficial, albeit discriminatory policy, but rather as a response to a personal bias or stereotype.[73]

This absence of benefit to the employer has never been considered relevant to the issue of whether questionable supervisory practices were illegal.

Job-Contingent Sexual Harassment: First Requirement of Liability

A distinction can be made between sexual harassment that is a personal encounter, not related to employment, and harassment that imposes on the woman employee a job-contingent demand for sexual submission. The *Williams* court recognized this distinction and reasoned that a case-by-case factual determination would be necessary:

> [W]hether this case presents a policy or practice of imposing a condition of sexual submission on the female employees of [the company] or whether this was a nonemployment related personal encounter requires a factual determination.[74]

Thus, a factual showing that submission to a sexual demand was made a condition of employment became the first requirement in the general standard used by courts for determining when sexual harassment amounts to discrimination based on sex. Under this standard, in order to state a valid claim for relief under Title VII, a plaintiff must first allege that the harassment or sexual demands constituted a condition imposed upon her employment and not imposed upon members of the opposite sex.

> Discrimination does not arise from demand for sexual favors but from the fact that retention of her job [or other terms or privileges of employment] was conditioned upon submission to sexual relations — an exaction which the supervisor would not have sought from any male.[75]

Stated somewhat differently, the courts have generally held that plaintiffs must have suffered some direct economic harm related to their employment status as a result of the harassment. In *Tomkins, Williams, Miller, Heelan,* and *Munford* the plaintiffs alleged that they were fired for refusing their supervisors' demands for sexual favors. In *Barnes,* the plaintiff alleged that her job was abolished and that she was given another position at a lower grade because of refusing such demands. Other plaintiffs have alleged a failure to be hired, failure to be promoted, or a forced resignation as grounds for their suits.

Thus, the federal courts have generally ruled that Title VII does not reach purely psychological harm from sexual harassment or an offensive working environment created by a super-

visor's sexual harassment. In *Neeley v. American Fidelity Assurance Co.* (1978), although the supervisor "affectionately" touched shoulders of female subordinates, exhibited pictures of sexual activity, and made sexual remarks, the court did not find a violation of Title VII since the harassment had not caused the plaintiff job-related harm.[76]

Likewise, the lower court in *Bunay v. Jackson* (1979) found that the plaintiff's allegation with regard to improper sexual advances made to her by other department employees (including supervisors) had been fully proved. But the lower court found no Title VII violation because the plaintiff had not suffered any economic detriment. "Plaintiff has been promoted as fast or faster than similarly situated male employees."[77]

This decision was reversed by the D.C. Circuit Court of Appeals on January 12, 1981.[78] Thus, there is at least one federal court willing to recognize a sexual harassment cause of action even where the employee's resistance to that harassment does not result in her being deprived of any tangible job benefit. This court reasoned that to hold otherwise would force potential plaintiffs into resigning in order to claim they had suffered a tangible job-related harm.[79]

A court-imposed requirement that to prevail on a Title VII sexual harassment claim the plaintiff must prove the harassment was job-contingent and resulted in direct economic injury explains why the federal courts have not been faced with a strict claim of co-worker harassment. In other words, a co-worker cannot make acquiescence to his sexual demands job-contingent because he is not in a position to wield such power or impose an economic sanction.

Employer Knowledge of the Conduct and Failure to Act: Second Requirement of Liability

Besides requiring that, to be a Title VII violation, submission to sexual harassment constitute a condition of employment, the courts generally have required proof that the condition was imposed with the actual or constructive knowledge of the employer.[80] Additionally, courts have been reluctant to find a Title VII violation unless the employer, once notified of the harassment, either ignored the complaint or explicitly condoned

the behavior. Thus, employer knowledge of the conduct and its failure to act in response has become the second requirement of the general standard developed by the courts for finding a Title VII violation. The Third Circuit Court of Appeals' reversal of the district court's decision in *Tomkins* (1977) precisely sets forth this standard:

> [T]itle VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status — evaluation, continued employment, promotion, or other aspects of career development — on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.[81]

Focusing on the same dual requirements, the first court to deal with a case of sexual harassment involving an institution of higher education dismissed the complaint. In *Fisher v. Flynn* (1979), an assistant professor claimed that "some part" of the discrimination she suffered was caused by her refusal to accede to the alleged romantic advances of her department chairman. The court said her allegation was insufficient to state a claim upon which relief could be granted.[82] The First Circuit Court of Appeals indicated that to state a valid claim, the complainant must allege that the harasser had some input in the adverse employment decision, or that other defendants (other university administrators) condoned, knew of, or should have known of the chairman's alleged advances.[83]

However, the appropriate standard for imposing liability on employers for sexual harassment by supervisors is far from settled. The D.C. Circuit Court of Appeals in *Barnes* (1977) assigned broad liability to employers, contending that "generally speaking, an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel."[84] This court reversed the district court's decision because it found no basis for relieving the employer of responsibility under Title VII in the case presented.

The issue of employer liability was also scrutinized by the court in *Munford v. James T. Barnes & Co.* (1977). The *Munford* court adopted a more conservative standard than that an-

nounced in *Tomkins* and *Barnes* — it seemed to require that the employer have actual knowledge (not simply constructive knowledge) of the offending conduct.

> The court agrees that an employer may be liable for the discriminatory acts of its agents or supervisory personnel if it fails to investigate complaints of such discrimination. The failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior. While the court declines to follow the holding in *Barnes* that an employer is automatically and vicariously liable for all discriminatory acts of its agents or supervisors, the court does hold that an employer has an affirmative duty to investigate complaints of sexual harassment and deal appropriately with the offending personnel.[55]

In *Heelan v. Johns-Manville Corporation* (1978) the court endorsed a standard of requiring actual or constructive knowledge on the part of the employer. The court in *Heelan* cited seven previous harassment cases and summarized the judicial view of employer liability prevailing in 1978.

> If employers have reason to believe that sexual demands are being made on employees, they are obligated under Title VII to investigate the matter and correct any violations of the law. Moreover, employers must inform employees that management is receptive to such complaints and, if proved true, that management will rectify the situation. If the employer fails to respond to a valid complaint, it effectively condones illegal acts.[56]

The Miller Decision

In 1979 the influential Ninth Circuit Court of Appeals moved away from this restrictive approach to employer liability for sexual harassment.[57] The court reversed the lower court's decision in *Miller* by imposing liability in the absence of any employer knowledge or opportunity to take appropriate action.

The defendant, the Bank of America, had argued that it was not liable for the discriminatory acts of one of its supervisors. The bank reasoned that, since it had an established policy against sexual harassment, and since it had provided the complainant with a means of redress through its internal grievance pro-

cedures, which she did not use, she had forfeited whatever claim for relief she might otherwise have had. The lower court found this reasoning persuasive.

However, the circuit court did not accept the bank's argument. Instead, it applied the "usual rule" that an employer is liable for the wrongs committed by its employees acting in the course of their employment. In an interesting analogy, the court suggested that it would hold a taxi company liable for injuries to a pedestrian caused by the negligent driving of a company driver, even if the company has a safety training program and strictly forbids negligent driving. Thus, as long as the supervisor is acting within the scope of his employment when he fires, fails to promote, or otherwise penalizes a subordinate for refusing his sexual advances, the employer can and should be held liable.[18]

The bank also lost its argument that a complainant should have to exhaust company remedies before filing a Title VII charge with the EEOC. The court stated unequivocally, "We decline to read an exhaustion of company remedies requirement into Title VII."[19] The court recognized that Title VII does require an employee to file any employment discrimination claim with the EEOC within 180 days of the last of the incidents in question, and that the EEOC must notify the employer of the charges within 10 days after receiving the employee's complaint. Thus, the court ruled:

> An employer whose internal procedures would have redressed the alleged discrimination can avoid litigation by employing those procedures to remedy the discrimination upon receiving notice of the complaint or during the conciliation period.[20]

The circuit court's ruling in *Miller* to impose liability on an employer in spite of its lack of knowledge of the conduct now stands as the most liberal decision involving a case of sexual harassment to be decided by the federal courts. Still, it does not reach nearly as far as do the new EEOC guidelines.

THE 1980 EEOC GUIDELINES

The EEOC insists that it has long recognized sexual harassment as a violation of Title VII of the Civil Rights Act of 1964. "However, despite the position taken by the Commission, sexual

harassment continues to be especially widespread.'"[91] In response, the EEOC published interim guidelines governing this aspect of sex discrimination on April 11, 1980.[92] These guidelines gave a sweeping interpretation to the reach of Title VII in sexual harassment cases.

The EEOC's interim guidelines defined sexual harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
> 1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
> 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
> 3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[93]

By including any conduct of a sexual nature that is found offensive, with no requirement of an economic detriment to the victim, and by including conduct directed by a co-worker toward another co-worker, these criteria outline a definition of actionable harassment that goes beyond what any of the federal courts, even in the *Miller* decision, seemed ready to accept. According to the EEOC, "the employer has an affirmative duty to maintain a workplace free of sexual harassment and intimidation."[94]

The interim guidelines announced two different standards for establishing a violation. In regard to actions of supervisory personnel, the regulations impose a form of strict liability. The employer is responsible for sexually harassing acts of its supervisors and agents "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."[95] A specific determination of liability will be made on a case by case basis.

In regard to harassment by persons other than supervisory employees and agents, the interim guidelines hold an employer responsible when it knows or should have known of the conduct.

"An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action," according to the EEOC.[96]

The EEOC received public comments for 60 days after the April 1980 publication of the interim guidelines. The Commission received more than 160 comments from employers, individuals, women's groups, and local, state, and federal government agencies. According to the EEOC, the greatest number of comments were those commending the Commission for publishing guidelines on the issue of sexual harassment, as well as for the content of the guidelines.[97]

Many of the commenting employers, however, said the guidelines' imposition of strict liability on employers with respect to sexual harassment by their supervisors and agents was too broad and unsupported by the case law. Objections were also made to including in the definition of sexual harassment any conduct that results in creating an unproductive or offensvie working atmosphere. A number of comments raised questions about the use of certain terms, such as "agent," "substantially," "others," and "appropriate action."[98]

After analyzing the comments, the EEOC drafted final guidelines and published them November 10, 1980.[99] The final guidelines reflect a clear decision on the part of the EEOC not to retreat from a broad definition of sexual harassment and an expansive concept of employer liability.

Only one change was made in the definition of sexual harassment. In subsection 3) the word "substantially" was changed to "unreasonably" in an attempt to clarify the EEOC's intent. That subsection now reads:

> 3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[100]

The final guidelines incorporate standards for establishing a violation identical to those contained in the interim guidelines. Employers will be held strictly liable for harassing acts of their supervisors and agents, regardless of whether the employer had knowledge of the conduct. Employers will be held liable for acts of persons other than supervisors and agents where the employer

knows or should have known of the conduct and fails to take immediate and appropriate corrective action.[101]

As a result of questions concerning what the interim guidelines meant by persons "other" than supervisors or agents, the final guidelines are more specific. Two separate sections now deal specifically with the conduct of co-workers and the conduct of non-employees.

> d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agent or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.
>
> e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.[102]

Neither the interim guidelines nor the final guidelines establish specific steps to be taken by an employer to fulfill its Commission-imposed obligation to take affirmative action to prevent sexual harassment. The guidelines simply present a few illustrative suggestions of what might be appropriate.

> (f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.[103]

Employers have been critical of the lack of more specific suggestions from the EEOC. In response, the EEOC commented, "Since each workplace requires its own individualized program to prevent sexual harassment, the specific steps to be in-

cluded in the program should be developed by each employer."[104]

Lastly, the final guidelines address what might be called "reverse sexual harassment" or the "theory of equal opportunity for benefits resulting from sexual harassment." The Commission stated in the introduction to the final guidelines that, although it did not consider a third party's denial of benefits to be an issue of sexual harassment in the strict sense, it did consider it to be a related issue governed by general Title VII principles. Thus, a new section has been included in the final guidelines to cover this possibility.

> (g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.[105]

The treatment of sexual harassment started out with the courts not recognizing a cause of action under Title VII by a victim who has proven sexual harassment because such conduct was not viewed as sex discrimination and eventually led to the EEOC's creation of a cause of action under Title VII for a third party who has purportedly been disadvantaged by such conduct — a phenomenal jurisprudential accomplishment.

CONCLUSION TO PART I

The EEOC's position is that further clarification and guidance on the reach of Title VII regarding sexual harassment will come through future EEOC decisions that will address specific fact situations.[106] Although that statement may be true, it is also possible that additional and perhaps contrary guidance will be forthcoming from the federal courts and Congress itself.

While the debate continues over which branch of government will have the final word on Title VII sexual harassment law — Congress, the courts, or the EEOC — another more fundamental issue is emerging. That issue involves the question of whether the law should regulate such conduct in the first place. Public reaction to the problem of sexual harassment suggests that a drastic change in male-female interactions in the work-

place would be necessary to eliminate sexual harassment, and this change may not come about via jurisprudence. Instead, the problem of sexual harassment may best be addressed through educating all concerned to the high personal, social, and economic costs of this destructive conduct. Some behavior should not have to be illegal to be recognized as unacceptable. Indeed, human resource managers and administrators are providing direction and guidance to company officials and educational institutions as they develop policies and procedures to deal with sexual harassment. The question becomes one of good human resource management, particularly when preventing sexual harassment can lead to clarifying appropriate social interaction between men and women within the workplace. This, in turn, would lead to greater equity for all.

Part II — SEXUAL HARASSMENT: A PRACTICAL APPROACH FOR PREVENTION

INTRODUCTION

Because the final EEOC guidelines do not give specific steps to be followed for implementing a program to prevent sexual harassment in the workplace, employers are searching for ways to fulfill their Commission-imposed obligation to ". . . take all steps necessary to prevent sexual harassment from occurring . . .", as outlined in subsection (f) of the guidelines. For most employers, the first step is to develop a policy statement endorsed by the President or Chancellor, or the Board of Directors or Board of Trustees, and to disseminate that policy to all supervisors, staff, faculty, and even students. In fact, many institutions of higher education are using the EEOC guidelines on sexual harassment in the workplace to form the basis for policy statements preventing the sexual harassment of students by faculty and staff.

Students, when employed as workers, are covered by Title VII. But in their role as students they would naturally seek redress for sexual discrimination under Title IX of the 1972 Education Amendments. Because the regulations under Title IX do not explicitly prohibit sexual harassment, some controversy still exists as to an institution's liability regarding sexual harassment of students. The National Advisory Council on Women's Educational Programs, however, has construed various points under Title IX to include such coverage and proposes the following definition of illegal sexual harassment under Title IX as:

> "Objectionable emphasis on the sexuality or sexual identity of a student by (or with the acquiescence of) an agent of an educational institution when (1) the objectionable acts are directed towards students of only one gender; and (2) the intent or effect of the objectionable acts is to limit or deny full and equal participation in educational services, opportunities or benefits on the basis of sex; or (3) the intent or effect of the objectionable acts is to create an intimidating, hostile, or offensive academic environment for the members of one sex."[107]

Furthermore, the Council is recommending that guidelines similar to those of the EEOC be promulgated by the Office for Civil Rights in the U.S. Department of Education to prohibit more explicitly the sexual harassment of students. In the meantime, many institutions have felt compelled to move forward in protecting students from this form of sex discrimination and are revising student grievance mechanisms to cover such complaints.

In addition, institutions and other employers are reviewing their employee grievance procedures (or perhaps instituting such processes for hearing complaints where no formal procedure exists) to allow for an informal resolution of sexual harassment concerns while protecting confidentiality and ensuring due process for both sides. In her article "Sexual Harassment: A Hidden Problem," Bernice Sandler suggests that the ". . . procedures need not be identical to other grievance mechanisms. Institutions might find a two-step procedure helpful: a mechanism to resolve complaints informally would be the first step, followed by a formal procedure if the first procedure has been unsuccessful. Institutions might also develop different procedures for students and for employees."[108]

A mediation process will be outlined later in this monograph as a means to accomplish this informal resolution step. Various remedial actions will also be suggested using the "progressive disciplinary" model once a decision has been reached through the use of the grievance procedure.

Finally, employers are identifying appropriate resources and support groups on campus for use by employees and/or students who need help in clarifying inappropriate behaviors and in dealing with related problems, and who seek advice on how to process complaints or how to handle or possibly avoid sexual harassment. Training programs and information seminars for supervisors, administrators, faculty, and staff are being held to sensitize all concerned to the problems of sexual harassment, to explain the employer's liability under Title VII, to promote the institution's policy prohibiting sexual harassment, and to clarify proper grievance procedures. Sexual harassment can be prevented when both men and women work together to recognize the problems and to find appropriate solutions.

DEFINITIONS

When developing a policy statement regarding sexual harassment, it is important to include a definition of what might constitute sexual harassment. Many advocacy groups and organizations have already provided such definitions, describing harassment as everything from verbal abuse and insults to actual physical assault. Five definitions are included here:

1. NATIONAL ORGANIZATION FOR WOMEN: Any repeated or unwarranted verbal or physical sexual advances, sexually explicit derogatory statements, or sexually discriminatory remarks made by someone in the workplace, which is offensive or objectionable to the recipient or which causes the recipient discomfort or humiliation or which interferes with the recipient's job performance.

2. DISTRICT OF COLUMBIA'S SEXUAL HARASSMENT POLICY: An incident in which a person uses his or her position to control, influence or affect the career, salary, or job of another employee or prospective employee in exchange for sexual favors.

3. ALLIANCE AGAINST SEXUAL HARASSMENT: Sexual harassment can take the form of verbal abuse such as insults, suggestive comments and demands, leering and subtle forms of pressure for sexual activity; physical aggressiveness such as touching, pinching, and patting and can end up as attempted rape and rape.

4. WORKING WOMEN UNITED INSTITUTE: Any repeated and unwanted sexual comments, looks, suggestions or physical contact that is found objectionable or offensive and causes discomfort on the job.

5. PROJECT ON THE STATUS AND EDUCATION OF WOMEN: Sexual harassment may range from sexual innuendos made at inappropriate times, perhaps in the guise of humor, to coerced sexual relations. Harassment at its extreme occurs when a male in a position to control, influence, or affect a woman's job, career, or grades uses his authority and power to coerce the woman into sexual relations, or to punish her refusal. It may include:

   - verbal harassment or abuse;
   - subtle pressure for sexual activity;

- sexist remarks about a woman's clothing, body or sexual activities;
- unnecessary touching, patting or pinching;
- leering or ogling of a woman's body;
- constant brushing against a woman's body;
- demanding sexual favors accompanied by implied or overt threats concerning one's job, grades, or letter of recommendation, etc.;
- physical assault.

Policy statements should cover those behaviors that are "offensive or objectionable" as cited in the first definition from NOW, as well as the "incident" in which power is used to gain "sexual favors" from an employee, as listed in the District of Columbia's definition. In fact, most institutions have been using the language offered in the EEOC guidelines under subsection (a) to define sexual harassment, paying particular attention to the listing of conditions to clarify just what does constitute such harassment.

POLICY STATEMENTS

It is a widely held belief that issuing a tough policy statement prohibiting sexual harassment might, in fact, help eliminate some of these incidents. Certainly, broadly disseminating such statements through the campus news media and other internal mechanisms puts everyone "on notice." The following policies demonstrate a variety of approaches used by institutions and are offered as suggestions for developing an institution's own statement.

The first example shows that the institution chose to develop separate policies for employees and students and to incorporate its shorter employment policy into its affirmative action plan.

Example 1.

Statement on Sexual Harassment

The (name of institution) shall not tolerate any behavior, verbal or physical conduct, by an administrator, supervisor, faculty or staff member which constitutes sex-

ual harassment of any employee as outlined in the EEOC Sex Discrimination Guidelines. Through information seminars all administators, faculty and staff will be kept informed of sexual harassment rules and available grievance procedures for alleged violations. Accountability for compliance with this policy shall be part of their regular, annual performance evaluations; violations may lead to disciplinary action to include suspension or termination.

Policy Statement on Sexual Harassment of Students

The Board of Trustees of the (name of institution) shall not tolerate any behavior by administrators, faculty, or staff which constitutes sexual harassment of a student. For the purposes of this policy, sexual harassment of a student will be defined as:

1. Unwelcome sexual advances,
2. Requests for sexual favors, and/or
3. Other verbal or physical conduct or written communication of an intimidating, hostile, or offensive sexual nature where:
    1. Submission to such conduct is made either explicitly or implicitly a term or condition of the student's status in a course, program or activity;
    2. Submission to or rejection of such conduct by a student is used as a basis for academic or other decisions affecting such student; or
    3. Such conduct has the purpose or effect of substantially interfering with a student's educational experience or creating an intimidating, hostile, or offensive academic environment.

Students will be provided the use of a student grievance procedure. All faculty, staff, and administrators will be held accountable for compliance with this policy; violations may lead to disciplinary action to include suspension or termination.

It is obvious that the policy statements in the first example rely heavily upon the EEOC guidelines for both employees and students. Accountability for compliance with the policy is also established; reference is made to grievance procedures and information seminars, and disciplinary action is included.

The next example demonstrates a more elaborate version for use in an institution's policy manual. It applies only to employees, uses an outline form with subheadings, establishes

clearly a supervisor's responsibility as well as that of the co-workers, and allows for the filing of a complaint immediately at the last step of a grievance procedure, if management fails to take immediate action. It is hoped that the final reference to the use of the Staff and/or Union Relations Office or the Affirmative Action Program Office for counseling and advice would provide an informal resolution of a problem prior to a formal grievance route.

Example 2.

Policy Manual

Section: Personnel
Subject: Sexual Harassment
Applies to: All Regular and Temporary Professional/Administrative/Instructional, Primary, Office, Technical and Service/Maintenance Staff Members

I. Policy:

The University is committed to maintaining a working environment free of inappropriate and disrespectful conduct and communication of a sexual nature, especially when such conduct is imposed by one on another and which adversely affects a staff member's employment relationship or working environment.

II. Definition:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

A. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,

B. submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or

C. such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

III. Regulations:

A. It shall be a violation of University policy for anyone who is authorized to recommend or take personnel actions affecting a staff member:

1. To make sexual advances or request sexual favors when submission to or rejection of such conduct is the basis either implicitly or explicitly imposing or granting terms and conditions of employment which either favorably or adversely affect the staff member's welfare;

2. To grant, recommend, or refuse to take any personnel action because of sexual favors, or as a reprisal against a staff member who has rejected or reported sexual advances; and

3. To disregard and fail to investigate allegations of sexual harassment whether reported by the staff member who is the subject of the alleged harassment, or a witness, and to fail to take immediate corrective action in the event of misconduct that has occurred.

Whenever there is such an abuse of authority, or neglect of responsibility, the appropriate supervisor is required to take prompt and corrective action consistent with the discipline provisions of the appropriate policy manual.

B. It shall also be a violation of this policy for any staff member to abuse another through conduct or communication of a sexual nature as defined in Section II, C of this policy. Whenever such misconduct exists, the supervisor is required to take prompt and corrective action consistent with the discipline provisions of the appropriate policy manual or labor agreement.

C. A staff member alleging either harassment by anyone with supervisory authority, or failure by supervision to take immediate action on the individual's complaint of being sexually harassed by another staff member(s), may file a grievance directly at the Final Step of the appropriate Grievance Procedure. In addition, the staff member may call either the appropriate Staff and/or Union Relations Office or the Affirmative Action Programs Office for immediate counseling and advice.

The policy statement in the third example covers both students and employees, again follows the definition given in the EEOC guidelines, cites a state statute as well as possible prosecution under the criminal sexual conduct law, establishes responsibility of deans, directors, and department heads, and ends with a reference to a more informal complaint process, including the same use of the Staff or Union Relations Office and the Affirmative Action Office as in the second example.

Example 3.

Policy Statement on Sexual Harassment

It is the policy of the (name of institution) that no members of the University community may sexually harass another. Any employee or student will be subject to disciplinary action for violation of this policy.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or education,
2. submission to or rejection of such conduct by an individual is used as the basis for academic or employment decisions affecting that individual,
3. such conduct has the purpose or effect of substantially interfering with an individual's academic or professional performance or creating an intimidating, hostile or offensive employment, educational, or living environment.

Sexual harassment is illegal under both state and federal law. In some cases, it may be susceptible to prosecution under the criminal sexual conduct law.

Deans, directors and department heads are urged to take appropriate steps to disseminate this policy statement and to inform students and employees of procedures for lodging complaints. Any (name of institution) employee having a complaint of sexual harassment should notify his/her immediate supervisor. If the complaint is against the immediate supervisor, that person's immediate supervisor should be contacted. A student should notify the Affirmative Action Coordinator in her/his school or college. At any time, a student or employee may call either the Af-

firmative Action Office or the Staff and Union Relations Office in the appropriate service center for counseling and advice.

Using a constituent Task Force on Sexual Harassment, the institution in the fourth example prepared various drafts of a statement over a period of months resulting in a policy that covers students and employees, as well as applicants for employment. The policy stresses the identification and training of supportive persons to receive allegations of sexual harassment, similar to the use of mediators discussed later in this monograph, and introduces an interesting point about malicious or ill-founded allegations.

Example 4.

Statement on Policy and Procedures Relating to Sexual Harassment

The (name of institution/system) seeks to prevent harassment of its students, employees and those who seek to join the campus community in any capacity. The following describes various measures appropriate in dealing with this subject.

Sexual harassment includes such behavior as sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature directed towards an employee, student, or applicant, particularly when one or more of the following circumstances are present:

—toleration of the conduct is an explicit or implicit term or condition of employment, admission or academic evaluation;
—submission to or rejection of such conduct is used as a basis for a personnel decision or academic evaluation affecting such individuals;
—the conduct has the purpose or effect of interfering with an individual's work performance or a student's academic performance, or creating an intimidating, hostile, or offensive working or learning environment.

The above definition is in line with the Equal Employment Opportunity Commission's regulations on sexual harassment.

The (name of institution/system), its officers, and employees are responsible for maintaining a working and learning environment free from sexual harassment. Existing disciplinary and grievance procedures or informal procedures, as appropriate, shall serve as the framework for resolving allegations of sexual harassment. Responsibilities include making widely known the prohibitions against sexual harassment and ensuring the existence of appropriate procedures for dealing with allegations of sexual harassment.

Further, each campus and the Office of the Chancellor shall designate persons to receive and discuss allegations of sexual harassment. These persons should be sensitive to the needs and rights of complainants and accused alike and should be particularly chosen for their approachability as perceived by various campus populations. They should be charged to maintain current information on applicable laws and institutional rules and regulations, and to explore with complainants the full ramifications of their allegations. Established procedures and the names and titles of those persons designated to receive sexual harassment allegations should be widely publicized.

The Office of the Chancellor is responsible for providing training for persons designated to receive allegations of sexual harassment. Campuses are encouraged to establish training programs of their own. Training should seek to sensitize such persons to the needs and concerns of all parties involved and should provide such persons with current information on applicable rules, regulations, laws and procedures, as well as techniques for careful scrutiny of allegations of sexual harassment which may be malicious or ill-founded.

The fifth example comes from a model program excerpted from the National Labor Relations Board Policy, Administrative Policy Circular APC 80-2, issued on February 21, 1980, and presented in an article by Michele Hayman and Rhonda Robinson in the December, 1980, issue of the *Personnel Journal* (p. 1000). In this article the authors stress the importance of developing a training program for current supervisors and employees, in addition to the publishing of a strong statement from top management. In the following example, the statement covers only employees, but it goes farther than the language of

the EEOC guidelines in defining sexual harassment, lists different sources for the resolution of complaints, and emphasizes awareness training for all.

Example 5.

Sexual Harassment

Sexual harassment is a form of employee misconduct which undermines the integrity of the employment relationship. All employees must be allowed to work in an environment free from unsolicited and unwelcome sexual overtures. Sexual harassment does not refer to occasional compliments. It refers to behavior which is not welcome, which is personally offensive, which debilitates morale and which therefore interferes with the work effectiveness of its victims and their co-workers. Sexual harassment may include actions such as:

- Sex-oriented verbal "kidding" or abuse,
- Subtle pressure for sexual activity,
- Physical contact such as patting, pinching, or constant brushing against another's body,
- Demands for sexual favors, accompanied by implied or overt promises of preferential treatment or threats concerning an individual's employment status.

Sexual harassment is a prohibited personnel practice when it results in discrimination for or against an employee on the basis of conduct not related to work performance, such as the taking or refusal to take a personnel action, including promotion of employees who submit to sexual advances or refusal to promote employees who resist or protest sexual overtures.

Complaints of sexual harassment involving misuse of one's official position should be made orally or in writing to a higher-level supervisor, to an appropriate personnel official, or to anyone authorized to deal with discrimination complaints (e.g. EEO counselor, union official, etc.).

Because of differences in employees' values and backgrounds, some individuals may find it difficult to recognize their own behavior as sexual harassment. To create an awareness of office conduct which may be construed as sexual harassment, we will incorporate sexual harassment awareness training in future managerial, supervisory, EEO,

employee orientation and other appropriate training courses. Additionally, a copy of this policy will be placed in each new employee's orientation kit.

Finally, some institutions have developed policy statements on "unprofessional conduct" rather than separate sexual harassment policies. Recognizing the issue of power over others, the following statement includes sexual harassment but makes no attempt to define it and does not refer to the EEOC Guidelines; however, it does provide a different approach that may be more acceptable to various constituents within the academic community.

Example 6.

Statement Concerning Unprofessional Conduct

Members of the University community — students, staff, administrators, and faculty — are entitled to a professional working environment, free of harassment or interference for reasons unrelated to the performance of their duties. Since some members of the community hold positions of authority that may involve the legitimate exercise of power over others, it is their responsibility to be sensitive to that power so as to avoid actions that are abusive or unprofessional. Faculty, and supervisors, in particular, in their relationships with students and supervisees, need to be aware of potential conflicts of interest and the possible compromise of their evaluative capacity. Because there is an inherent power difference in these relationships, the potential exists for the less powerful person to perceive a coercive element in suggestions regarding activities outside those appropriate to the professional relationship. It is the responsibility of faculty and supervisors to behave in such a manner that their words or actions cannot reasonably be perceived as coercive.

Unprofessional conduct includes, but is not limited to, the following:

(1) exploitation of another person for private advantage;
(2) appropriation of another person's work without appropriate credit;
(3) sexual harassment;
(4) unreasonable and substantial interference with another person's work performance;

(5) creating an intimidating, hostile, or offensive working environment based on sex, race, religion, age, political belief, or national origin.

Nothing contained in this policy shall be construed either to limit the legitimate exercise of right of free speech or to infringe upon the academic freedom of any member of the University Community.

All of the above samples are offered as models for use in developing a policy statement to describe the institution's concern for preventing sexual harassment of employees and/or students. Because labor unions are also covered by the EEOC regulations, it is appropriate to negotiate language in the "fair practice" section of the collective bargaining agreement to cover sexual harassment. Obtaining top administrative support for the policy is as important as involving appropriate constituent groups in designing the policy and procedures.

Finally then, a policy statement indicating that sexual harassment will not be tolerated can act as a deterrent; it puts everyone "on notice." A statement including references to sanctions and other remedial actions also can be used for disciplinary reasons; it should come as no surprise to the harasser that the institution intends to follow through on legitimate complaints. Of cour[illegible] a good, widely disseminated policy statement can also [illegible] as part of the institution's defense should a charge be [illegible] with the EEOC.

GRIEVANCE PROCEDURES

Part of any good policy should at least mention use of internal grievance mechanisms to resolve complaints. Even though Title VII does not specifically require grievance procedures, most human resource managers and legal counsels agree that such mechanisms afford the employer a way of taking "immediate and appropriate corrective action," as repeatedly suggested in the EEOC guidelines. Such procedures also help to ensure due process for both sides.

Although employees are not required to file complaints internally within the company or institution before filing with the EEOC, it is important to have avenues open to resolve problems

and settle grievances caused by sexual harassment. In fact, most employers have established procedures to cover complaints of discrimination based on race, religion, sex, age, national origin, or handicap; most employers maintain either a separate set of procedures or include coverage for such complaints in the regular grievance process for any and all job-related concerns. Grievance procedures are as numerous and as varied as there are institutions within this country. However, most of them follow a normal pattern of initial discussion with a supervisor and/or department chair or a "support" person such as the Affirmative Action Officer. Such an informal step may lead directly to the resolution of a problem; however, most procedures provide for an additional formal procedure, including steps up the hierarchy of administration, written complaints and responses, time frames for each step, hearing boards, and appeal processes.

Some institutions allow for legal counsel to represent both sides; others provide only for third party representation from the members of the university or college community on campus. Other institutions have established a non-partisan ombudsperson as an independent investigator who has the power to hear complaints, to fact-find, and to recommend administrative action. For many institutions, covering sexual harassment complaints has become a matter of "fine tuning" already existing grievance procedures to include some form of mediation. The following policy revision has been inserted into an institution's grievance procedures for both professional and operating (or classified) staff members:

Mediation Process

> Because of the private nature of most sexual harassment incidents and the emotional and moral complexities surrounding such issues, every effort should be made to resolve such problems on an informal basis if possible. An aggrieved employee may choose a third party mediator (from the campus panel of trained mediators) to help resolve the complaint. Such mediation activities shall continue for a period of no more than 30 working days or until resolution is achieved if that is less. Following the period of 30 working days, should mediation efforts fail, the employee may initiate the formal grievance procedure at Step II. The action to file such a grievance must be taken no later than 10 working days from the date of the cessation of the 30-day mediation period.[109]

This mediation process specifies a longer time frame and serves as a substitute for the normal first step in the grievance procedure; however, an employee may choose not to use mediation and begin instead with the normal process at Step I.

The use of a mediator is coordinated through the Office of Affirmative Action on that campus, with the aggrieved party and the Affirmative Action Director selecting from the panel a mediator who has the skills to deal most effectively with that particular case. Selection of faculty and staff members to serve as mediators on the panel came through recommendations from constituent groups, as well as interest shown by the members themselves. Training sessions with the mediators stressed communication and personal persuasion techniques, respect for both sides and egos involved, open-mindedness to the issues, a thorough discussion of the EEOC Guidelines, various definitions of sexual harassment, and the range of resolutions available through administrative action and relevant policies. A mediator may not need the entire 30 days to effect a resolution and, of course, may also discover in less than 30 days that a resolution cannot be found. In the latter event, the aggrieved party may decide to initiate the formal grievance procedure prior to the end of the 30 days. In any event, confidentiality is of utmost importance, as well as the establishment of trust in and respect for the mediator by both sides.

Similar mediation efforts are taking place on other campuses. Use of such an informal mechanism to resolve problems is also endorsed by the American Federation of State, County, and Municipal Employees in its booklet on sexual harassment. AFSCME suggests:

> Explore the possibility of having a management person within the organization to whom the problems of sexual harassment could be brought in strict confidentiality. This person would have the authority to investigate the complaint and try to resolve it informally before a complaint or grievance is filed.[110]

Such a person could be the Ombudsperson, the Human Rights Officer, or the Affirmative Action Officer, as indicated in several procedures reviewed in preparation for this monograph. Whatever procedure is used should establish clear guidelines on how to file a complaint or where to seek ap-

propriate redress, specify time frames, and also ensure due process for both the victim and the alleged harasser. In many student grievance procedures, faculty and staff members are even provided avenues of review of a Hearing Board's final decision through the appropriate faculty or staff grievance procedure. Sanctions or remedial actions should also be clearly defined with regard to faculty policies or dismissal procedures and other administrative actions for professional and/or operating (classified) staff members. (See Appendix A for a sample student grievance procedure.)

SANCTIONS

Obviously, remedial actions will depend on the severity of the incident. Again, because of the private nature of most sexual harassment incidents, and the emotional and moral complexities surrounding such issues, every effort should be made to resolve problems on an informal basis, if possible. When a third party mediator can resolve the complaint informally, no formal record need be made of the incident *in the personnel file of the wrongdoer.* An admission of guilt, an acknowledgment of the verbal warning, a promise not to commit such abuses again, and action taken to provide appropriate relief for the aggrieved party may be sufficient resolution. At this informal stage, one hopes to sensitize the person at fault to the effects of such behavior, to be constructive, and not to be unduly punitive in the disciplinary action. If, however, the harasser does not follow through with the resolution agreed upon, the aggrieved party should take the complaint to the appropriate grievance procedure. Of course, a record of mediation efforts should be kept in a central administrative office.

Once the formal grievance process has been used and a decision reached (at whatever stage), the following remedial actions, based upon a "progressive discipline" model, may be applied (again, the severity of the case may dictate which action is taken):

> First stage — a letter of reprimand will be written and placed in the guilty party's personnel file, with a terminal life of two years (usually); action will be taken to provide appropriate relief for the aggrieved party.

Second stage — a letter of reprimand for the person's file and suspension without pay or leave of absence for a period of time (to be determined); again, the aggrieved party will be provided appropriate relief.

Third stage — termination of employment of the guilty party; the aggrieved party to be reinstated, restored, given appropriate relief and so forth.

Other intermediate actions can also be taken, such as: involuntary demotion of the wrongdoer, lack of merit pay, transfer for either party, removal from administrative duties within a department, enrollment in an appropriate in-service training program such as "Men and Women at Work," obtaining professional counseling, and so forth — whatever is most appropriate within the resources of the institution and in compliance with faculty or staff policies regarding discipline and professional behavior. In cases of employment termination of faculty members, existing dismissal procedures should be followed or refined for use in relation to sexual harassment cases.

RECORDKEEPING AND REPORTING

Although the EEOC has not included specific recordkeeping requirements in its sexual harassment guidelines, it does have the power to require that records be kept in order to determine whether there have been violations of Title VII regulations. Obviously, the EEOC may review all relevant records, particularly those kept on grievance procedures and mediation efforts. Many institutions/employers are re-examining their current recordkeeping mechanisms and are especially concerned with the maintenance of confidentiality. In developing statements on how complaints will be treated, many employers are including specific time limits on keeping formal documentation and on exactly what kinds of proceedings will require written records.

For example, when a staff member or student seeks only information or clarification regarding what constitutes sexual harassment — the policies or procedures, the consequences of various actions, and so forth — usually no formal records, except for some kind of statistical counts, are being made of such

inquiries. However, when a person wishes to report an incident or to lodge a complaint (even as a third party) for which he or she is seeking resolution, a variety of reporting procedures are being used. Most specify a format for collecting the necessary information, including such items as: the date and location of the incident; how the complaint was made — by phone, by mail, in person; a brief description of the incident, including the names (if known), the extent of the harassment, other known victims, witnesses, etc.; impact on the victim; desired resolution by the victim; and finally the kind of assistance given by the office or person receiving the complaint, with referrals listed or plans for follow-up actions. Logging such complaints can be helpful in subsequent grievance procedures as well. Collecting general information on the extent of sexual harassment of employees and students can be accomplished through various survey methods. Added to these surveys, the statistics on "information inquiries" can also be used to determine the continuing need to sensitize the campus community or workplace to the effects of sexual harassment.

STUDENTS HARASSING STUDENTS OR EMPLOYEES

To the surprise of many administrators, both at the secondary and post-secondary levels of education, many cases of students sexually harassing other students have been reported and processed through the institutions' grievance or disciplinary procedures. Several universities indicate that student government leaders are taking an active role in adding sexual harassment coverage to the "respect for others" section of the assault rule in their own set of regulations governing student conduct. Violations of these rules are processed through the students' judicial procedures and, depending on the severity of the case, can lead to expulsion from the institution.

In addition, many institutions are allowing faculty or staff members to bring charges of sexual harassment against students in accordance with that same "respect for others" rule and to process such complaints through the student judicial procedures. Again, due process for both sides must be ensured. Other administrative policies covering misconduct of students toward faculty or staff members should be reviewed in light of sexual harassment charges and revised accordingly, if necessary.

Most divisions or departments of student affairs are developing educational efforts to inform students of the new sexual harassment policies, grievance procedures, support groups, and reporting mechanisms, as well as to raise students' sensitivity to human sexuality issues, including their responsibilities toward each other and all members of the campus community.

TRAINING PROGRAMS

Institutions/employers are providing information seminars for supervisory personnel, administrators, faculty, and staff members. The seminars are designed to sensitize these individuals to the problems of sexual harassment, to explain policies and grievance procedures, and especially to encourage all concerned to open up new lines of communication so that appropriate social interaction between men and women in the workplace and in the classroom can take place.

Much of the research and material being written about sexual harassment links this behavior to learned role models of the genders. To enable people to learn more about changing relationships and gender roles, staff and management seminars should include some case studies that put the victim-harasser problem into not only the employer liability framework, but also into a context for participants to discuss appropriate behavioral responses. (See Appendix B for two samples.)

In addition to written materials, various media-training aids are being produced, and surely more will follow. (Appendix C lists various resources currently available.) Support groups on campus, such as the Women's Center or Women's Commission, the Counseling Center, the Task Force on Sexual Harassment, or other advocacy/constituency groups, are also attempting to educate victims, co-workers, managers, and faculty to the effects of sexual harassment on the employee or student.

Learning to listen, saying "no" to sexual advances without "putting the other person down," discussing when "flirting becomes harassment," reviewing men's responsibilities, clarifying women's responsibilities, and finally discovering useful, logical, and mutually satisfying gender-related social and work behaviors could be the focus for such workshops, according to

Mary Fuller in her text on *Sexual Harassment: How to Recognize and Deal With It*. She includes a section on "principles for managers to manage by when both sexes are at work" (p. 42–43) and wisely concludes that:

> We know that finding mutually satisfying gender-related social and work behaviors is not going to be particularly easy. Nor will the new "rules" be discovered overnight. However, once they are found and sorted out, productivity will rise and relations will be much smoother between the sexes at work.
>
> Our culture values diversity of action and belief. It also values mutual problem-solving activities. Having respect for differences and having the skill to agree to disagree will assist people in work groups to work more effectively together.
>
> Some groups will take a long period of time to develop specific, public and wholly acceptable guidelines for new social/work behaviors. Managers need to be sure of their management principles so that employees can develop clear guidelines congruent with public law and organizational policy.[11]

Putting such sexual harassment information seminars into the above described context will hopefully help to bring about that desired "change in the way men and women interact in the workplace," as suggested in the conclusion to Part I of this monograph.

NOTES

1. 42 U.S.C. §§ 2000e to 2000e-17 (1976).
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4. Bularzik, "Sexual Harassment at the Workplace: Historical Notes," 12 *Radical America 25* (July-August 1978).
5. *Muller v. Oregon,* 208 U.S. 412 (1908).
6. Alliance Against Sexual Coercion information packet (leaflet, no date).
   Working Women's Institute information packet (leaflet, no date.)
7. Working Women's Institute, *Sex Harassment on the Job, Results of Preliminary Survey* (1975).
8. Safran, "What Men Do to Women on the Job: A Shocking Look at Sexual Harassment," *Redbook*, November 1976.
9. House of Representatives Committee on Post Office and Civil Service, *Sexual Harassment in the Federal Government*, April 1980.
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    Rivers, "Sexual Harassment: The Executive's Alternative to Rape," *Mother Jones,* June 1978.
    "Sexual Harassment Lands Company in Court," *Business Week*, October 1, 1979.
11. Working Women's Institute Project Statement (leaflet, no date).
12. Bularzik, *supra* note 5, at 29.
13. Working Women's Institute, *supra* note 8.
14. Safran, *supra* note 9, at 217.
15. Association of American Colleges (leaflet, June 1978).
16. Safran, *supra* note 9, at 218.
17. *Id.*
18. Rivers, *supra* note 10, at 29.
19. Pogrebin, "Sex Harassment," *Ladies Home Journal,* June 1977.
20. 288 N.W. 2d 857 (Wisc. 1980).
21. *Id.*
22. *Pogrebin, supra* note 19, at 28.

23. Proposed Amendment to the New York State Unemployment Compensation Insurance Law.
24. Working Women's Institute letter to legislators, April 27, 1977.
25. Wis. Stat. Ann. § 108.04(7)(i)(1979).
26. *In re Nancy J. Fillhouer,* Case No. 75-5225, California Unemployment Insurance Appeals Board, Referee's Decision No. 55-5963, reversed on appeal, July 24, 1975.
27. *Id.*
28. Rivers, *supra* note 10, at 28.
29. *Clark v. World Airways, Inc. et al.,* Civil Action No. 77-0771 (D.D.C., October 24, 1980).
30. 114 N.H. 130, 316 A.2d 549 (1974).
31. *Id.*
32. Legal material checklist distributed by Working Women's Institute, February 1979.
33. *Id.*
34. *Id.*
35. Wis. Stat. Ann. § 108.04(7)(i)(1979).
36. *Id.*
37. Press Release, May 1, 1978.
38. 1980 Mich. Pub. Acts (Enrolled House Bill No. 4407).
39. Decision of State of Michigan Civil Rights Commission No. 33262-S7, October 24, 1979.
40. Decision of State of Michigan Civil Rights Commission No. 30554-S7, December 19, 1979.
41. Decision of State of Michigan Civil Rights Commission No. 31422-S7F, February 26, 1980.
42. *Id.*
43. N.W. 2d, 22 FEP Cases 1808 (Minn. 1980).
44. *Id.*
45. 42 U.S.C. §2000e(2)(a)(1) and (2).
46. *Barnes v. Train,* Civ. No. 1828-73, 13 F.E.P. Cases 123 (D.D.C. 1974).
    Miller v. Bank of America, 418 F.Supp. 233 (N.D.Cal. 1976).
    Corne v. Bausch & Lomb, Inc., 390 F.Supp. 161 (D. Ariz. 1975).
    Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976).
47. *Id.*
48. *Id.*

49. *Garber v. Saxon Business Products, Inc.*, 522 F.2d 1032 (4th Cir. 1977).
Barnes v. Costle, 561 F.2d 983 (D.C.Cir. 1977), *reversing and remanding Barnes v. Train, supra*, note 52.
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Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3rd Cir. 1977), *reversing and remanding Tomkins, supra*, note 52.
50. 13 F.E.P. Cases at 123.
51. 411 F.2d 1 (5th Cir. 1969), *rehearing denied*, 416 F.2d 1257 (5th Cir. 1969), *rev'd*, 400 U.S. 542 (1971).
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53. Weisel, *supra*, note 4, at 131.
54. *Id.*
55. 413 F.Supp. 654 (D.D.C. 1976).
56. 561 F.2d 983 (D.C.Cir. 1977).
57. 390 F.Supp. 161, 163.
58. 422 F. Supp. 553, 554.
59. Weisel, *supra*, note 4 at 127.
60. 413 F.Supp. 658 at Note 6.
61. *Id. at 656.*
62. Weisel, *supra*, note 4 at 128.
63. *Id.*
64. Pub. L. 95-555, *supra*, note 3.
65. Weisel, *supra*, note 4 at 128.
66. 422 F.Supp. at 554.
67. 418 F.Supp. at 234.
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71. 418 F.Supp. at 234.
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73. Weisel, *supra*, note 4 at 141.
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75. 561 F.2d at 989.
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77. ____ F.Supp. ____, 19 F.E.P. Cases 828 (D.D.C. 1979).
78. *Bundy v. Jackson*, 49 U.S.L.W. 2453 (D.C.Cir. Jan. 12, 1981).

79. *Id.*
80. 568 F.2d at 1048.
81. *Id.*
82. 598 F.2d 663 (1st Cir. 1979).
83. *Id.*
84. 561 F.2d at 990.
85. 441 F.Supp. 459 (E.D. Mich. 1977).
86. 451 F.Supp. at 1382.
87. 600 F.2d 211.
88. *Id.*
89. *Id.* at 214.
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91. 45 Fed. Reg. 25024 (1980) (to be codified in 29 CFR Part 1604).
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. 45 Fed. Reg. 74676 (Mon. Nov. 10, 1980).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Sexual Harassment: A Report on the Sexual Harassment of Students,* Part II: Technical Supplement, National Advisory Council on Women's Educational Programs, August, 1980, p. 11.
108. Sandler, B. "Sexual Harassment: A Hidden Problem," *Educational Record,* Winter, 1981, p. 57.
109. University System of New Hampshire Grievance Procedures, USNH Policy Manual, Sections VII E, 10.1 and VII, F, 7.1.
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APPENDIX A: SAMPLE STUDENT GRIEVANCE PROCEDURE

Preface

A formal grievance may be filed any time a degree candidate or special student believes that her/his rights, as outlined in the Declaration of Rights and Responsibilities, have been violated. Grievances may arise over sexual harassment or alleged discrimination on the basis of race, color, religion, veteran status, sex, age, national origin or handicap.

However, each student and faculty member, administrator or staff member has an obligation to make every effort to resolve problems informally as they arise. All members of the University community are urged to resolve problems fairly and informally so that they do not become sources of grievances to be pursued formally through the grievance procedure. If a suitable solution cannot be reached informally through independent means, which may include consultation with staff members of the Affirmative Action Office, Dean of Students Office, or Vice President for Student Affairs Office, a formal grievance may be initiated.

It is expected the formal grievance procedure will commence with Step I in each case. However, because of the private and sensitive nature of sexual harassment and possibly certain other incidents, an aggrieved student may choose a third party mediator (from the campus panel of trained mediators and coordinated by the Director of Affirmative Action) to help resolve such a complaint on an informal basis. Such mediation activities shall continue for a period of no more than 30 class days or until resolution is achieved if that is less. Should such resolution efforts fail in addressing these issues, the student may initiate the formal grievance procedure at Step II.

Step I

Any and all complaints must be presented formally within 10 academic class days (summer session exempted) of the student becoming aware of the alleged grievance and within one year of its occurrence. The student opting to exercise the formal grievance procedure should so notify the concerned staff or faculty member, or administrator, present him/her with a writ-

ten summary of the complaint and set up a time to meet and discuss the problem. (In the event a faculty or staff member is unavailable for legitimate reasons, such as professional or vacation leave, the appropriate Vice President will determine when the grievance will be heard.) At this meeting the student may be accompanied by a third party, if desired, and as defined in student rule 13.4-8(s). Faculty and staff members are also entitled to a third party in accordance with established policy.

Prior to this presentation, the third party shall have an opportunity to discuss the complaint independently with other parties directly affected by or involved in the situation.

In the oral presentation of the complaint, all parties shall make a good-faith effort to resolve the matter. The faculty or staff member, or administrator, shall then give a formal written response to the complaint within three academic class days, available to the student at the Dean of Students Office.

Step II

If the aggrieved student believes a further review of the complaint is warranted she or he shall, within five academic class days of receiving the Step I decision, notify the appropriate parties that he/she wishes to pursue the next step. In cases where this is the first formal step in an alleged sexual harassment or other private and sensitive grievance, the aggrieved student should notify the concerned faculty or staff member or administrator in writing within ten academic class days of the failure of informal resolution (mediation efforts) with a summary of the complaint. If the complaint involves:

1. A faculty member, notify that faculty member, the department chairperson/program director, and dean of that college/school;
2. A PAT staff member, notify that staff member, his /her supervisor and administrative officer;
3. An operating staff member, notify that staff member, his/her immediate supervisor, and administrative officer;
4. A principal administrator, notify that person and the University President.

The student and third party shall meet with the faculty or staff member or administrator and the above notified parties to

discuss the grievance within ten academic class days of this notification. The dean, administrative officer or immediate supervisor (whichever is applicable from above) shall render a decision and advise the parties in writing of his/her decision within five academic class days following the discussion. If the decision involves a finding of guilt, the decision will also include a statement of the sanction to be imposed.

Failure of the faculty or staff member or administrator to meet the deadline dates established within any of the steps of the grievance procedure moves the process to the next step.

Failure of the student to meet time specifications acknowledges the student's acceptance of the decision of the previous step. He/she forfeits the right to pursue the grievance further.

Step III

If the aggrieved student believes a further review of the complaint is justified, she/he may submit a written appeal to the University President within five academic class days of receipt of the decision rendered under Step II. The petition should be accompanied by a statement of the resolution sought and copies of any previous written statement.

The University President shall appoint a Hearing Board, within 15 academic class days, which shall consist of two students, two tenured faculty members, and one academic administrator or staff member (depending on the case). The membership of the Hearing Board will be selected from an established panel of students, faculty, and staff constituted for this purpose. Each party shall have the right to challenge up to two Board members.

The Board will initiate the following procedures:

1. A meeting will be held within five academic class days after receiving the grievance.
2. To conduct business, all members must be present.
3. To select a chairperson from among its membership.
4. The written grievance will be read and discussed by all voting members to determine whether a prima facie case of error had been made. The board may then:

a. reject the complaint for insufficient grounds by a 4/5 majority vote;
b. accept the complaint.

5. Once a complaint is accepted, the Board Chairperson will assign members to conduct a thorough investigation as expeditiously as possible and in no case longer than one calendar month. Complete access to all pertinent files, records, and policies, and cooperation from concerned students, faculty, and staff shall be available to the investigating team.
6. Adherance to the University policies of confidentiality will be maintained by Board members.
7. The investigating team shall submit a report to the full Board, after which one or more of the following options may be exercised:
   a. reject the case for insufficient grounds;
   b. refer the case to an appropriate office for action;
   c. attempt a solution through mediation or arbitration of appropriate Board members or a designee;
   d. conduct a formal hearing.

Formal Hearing Procedures

At a time and place of mutual convenience, within five academic class days of the submission of the investigative report, the student and his/her representative shall present the case in person to the Board. The faculty or staff member and his/her representative may then respond. Every effort shall be made to establish a fair forum conducive to obtaining all relevant information prior to rendering a decision.

The Board, in executive session, shall arrive at a decision and/or recommendation within five academic class days after the case has been heard. The decision shall be given to all parties, including the staff or faculty member's immediate supervisor, with an appropriate written rationale. Faculty members or staff members may seek a review of the Board's decision through the appropriate University faculty or staff grievance procedure. In the case of faculty members, a sanction of dismissal necessitates following dismissal procedures outlined in the faculty handbook. The appropriate step of the faculty

grievance procedure should be followed in the case of lesser penalties.

Note: The Dean of Students Office shall act as a resource center for students and for the Hearing Board unless otherwise involved in the case, at which time the Office of the Vice President for Student Affairs will provide requested services.

Penalties in Cases of Sexual Harassment

Remedial actions will depend on the severity of the incident. Because of the private nature of certain incidents, particularly those involving sexual harassment, and the emotional and moral complexities surrounding such issues, every effort should be made to resolve problems on an informal basis if possible. When a complaint is resolved informally, no formal record need be made of the incident in the personnel file of the guilty party. An admission of guilt, an acknowledgment of the verbal warning, a promise not to commit such abuses again, and action taken to provide appropriate relief for the aggrieved party may be sufficient resolution. At this informal stage, it is hoped to sensitize the person at fault to the effects of such behavior, to be constructive and not unduly punitive in the disciplinary action. If, however, this person does not follow through the resolution agreed upon, the aggrieved party should take the complaint to the appropriate grievance procedure.

Once the formal grievance has been instituted and a decision reached, remedial actions will be based upon a "progressive discipline" model. The severity of the case will dictate the action taken in accordance with established policy as outlined in the UNH Faculty Handbook for Faculty and the University Policy Manual for Professional, Administrative, Technical and Operating Staff.

APPENDIX B: SEXUAL HARASSMENT CASE STUDIES

The following two case studies have been used successfully as a training tool at the conclusion of information seminars for supervisors and/or staff members. They help to generate discussion and questions by participants. The example of "Donna" is loosely based on the *Continental Can v. State of Minnesota* case, while the "Margaret" sample is based on the *Miller v. Bank of America* reversal decision. Both cases are cited in Appendix D and are discussed in Part I of this monograph.

* * *

The custodial crew for the University's Coliseum had been all male until Donna was hired. The crew didn't dislike Donna — but it didn't make her feel welcome, either. The men kept up an almost running conversation about women and spoke about them in a demeaning and degrading way. The men had pin-ups taped to their lockers. Several times Donna found obscene pictures or cartoons taped to her locker. Every day the men would exchange dirty jokes and laugh at Donna if she blushed or tried to ignore them.

The crew's supervisor didn't participate in the joke telling or constant comments about women's anatomy; but neither did he try to stop it. He figured his job was to treat everyone equally and he tried to do that. He didn't play favorites with job assignments or performance evaluations and he made sure Donna wasn't mistreated by being given more than her fair share of whatever work had to be done. He gave her a good merit evaluation.

After several months of hoping the men would ease off and change their ways, Donna couldn't stand the situation any longer. She quit and then filed a sexual harassment claim with the EEOC. Does she have a case?

Would it make a difference if Donna had not quit, but had complained first to the EEO Office (at the University) and, if that hadn't helped, asked for a transfer to another crew?

Would it make a difference if the supervisor knew nothing about the offensive conduct until after Donna complained to the EEOC?

Should Donna be entitled to Unemployment Compensation?

* * *

Margaret, a systems analyst, had worked for the company only for about six weeks when her operations supervisor promised her a better job if she would be sexually cooperative. When Margaret refused, he caused her dismissal.

The company had a policy of discouraging sexual advances and of affirmatively disciplining employees found guilty of such conduct. The company also had an Employee Relations Department established to investigate employee complaints, including complaints of sexual impropriety and sexual advances.

Margaret chose not to avail herself of the services of the Employee Relations Department and instead filed a written charge with the EEOC. Upon receiving her right-to-sue letter, she filed a lawsuit in federal court asking for injunctive relief, reinstatement, back pay, and attorney's fees.

Assuming Margaret can prove the facts of her case, can the company be held liable for the misconduct of the supervisor?

Does the fact that the company had a policy against harassing conduct make any difference?

Does the fact that Margaret refused to use the company grievance procedure make any difference?

Would it make any difference if the supervisor had a reputation as a harasser and had fired two other women employees during their probationary period?

APPENDIX C: BIBLIOGRAPHY — MATERIALS ON SEXUAL HARASSMENT

Books

Sexual Shakedown: The Sexual Harassment of Women on the Job, Lin Farley, 1978, 228 pages, $9.95.

McGraw-Hill Company
1221 Avenue of the Americas
New York, N.Y. 10020

Sexual Harassment of Working Women, Catherine MacKinnon, 1979, 321 pages, $5.95.

Yale University Press
New Haven, Connecticut 06520

Newsletters

On Campus With Women, Project on the Status and Education of Women, published quarterly.

Project on the Status and Education of Women
Association of American Colleges
1818 R Street, N.W.
Washington, D.C. 20009
(202) 387-1300

Handbooks/Brochures/Pamphlets

Sexual Harassment: A Report on the Sexual Harassment of Students, National Advisory Council on Women's Educational Programs, August 1980, 86 pages.

National Advisory Council on Women's Educational Programs
1832 M Street, N.W. #821
Washington, D.C. 20036
(202) 653-5846

Fighting Sexual Harassment: An Advocacy Handbook, Alliance Against Sexual Coercion, 1979, 76 pages, $3.50, plus *An Update,* $2.00. Combined price $4.75.

Alliance Against Sexual Coercion
P.O. Box 1
Cambridge, MA 02139
(617) 482-0329

Sexual Harassment: What It Is, What to Do About It, Women Organized Against Sexual Harassment, 1980, 10 pages, $1.00.

Women Organized Against Sexual Harassment
300 Eshleman Hall
University of California
Berkeley, California 94720

Sexual Harassment: A Hidden Issue, Project on the Status and Education of Women, June 1978, 8 pages.

Project on the Status and Education of Women
Association of American Colleges
1818 R Street, N.W.
Washington, D.C. 20009
(202) 387-1300

Sexual Harassment — On the Job Sexual Harassment: What the Union Can Do, 1980, 38 pages.

American Federation of State, County and Municipal Employees
1625 L Street, N.W.
Washington, D.C. 20036

Sexual Harassment: How to Recognize and Deal With It, Mary M. Fuller, 1979, 52 pages $3.50 + .50 postage

What Would Happen If . . , Inc.
c/o Eastport Litho
1993 Moreland Parkway
Annapolis, MD 21401

Articles (Chronological Order)

"How Do You Handle Sex on the Job: A Redbook Questionnaire," *Redbook,* Vol. 146, January, 1976, 2 pages.

"What Men Do To Women On the Job," Claire Safran, *Redbook,* November 1976, 6 pages.

"Sex Harassment," Letty Cottin Pogrebin, *Ladies Home Journal,* June 1977, 2 pages.

"Sexual Harassment on the Job and How to Stop It," Karen Lindsay, *Ms.*, Nov. 1977, 9 pages.

"Seduction in Academe," Adrienne Munich, *Psychology Today,* Feb. 1978, 4 pages.

"A Proposal: We Need Taboos on Sex at Work," Margaret Mead, *Redbook,* April 1978, 3 pages.

"Sexual Demands on the Job," Jill Laurie Goodman, *Civil Liberties Review*, March/April, 1978, 4 pages.
"Sexual Harassment: The Executive's Alternative to Rape," Caryl Rivers, *Mother Jones*, June 1978, 5 pages.
"Sexual Harassment in the Workplace — What Should the Employer Do?" Mary Faucher and Kenneth J. McCulloch, *EEO Today*, Spring, 1978, 8 pages.
"Update: Sexual Harassment on the Job," *Ms.*, July 1978, 4 pages.
"Sexual Harassment At the Workplace — Historical Notes," Mary Bularzik, *Radical America*, Vol. 12, No. 4 July/August 1978, 20 pages.
"Sexual Harassment in Employment: The Double Bind," Darrel Long Tillar, *Equal Opportunity Forum*, May 1979, 3 pages.
"How to Tame the Office Wolf — Without Getting Bitten," Jill Bettner, *Business Week*, October 1, 1979, 2 pages.
"Sexual Harassment Lands Company in Court," *Business Week*, October 1, 1979, 3 pages.
"Sexual Harassment: A Form of Discrimination," Sandra Sawyer and Arthur Whatley, *The Personnel Administrator*, January 1980, 4 pages.
"Abusing Sex at the Office," *Newsweek*, March 10, 1980, 2 pages.
"Sexual Harassment: New Rules to the Game," Darrel Long Tillar, *Equal Opportunity Forum* July, 1980, 3 pages.
"Title VII Sexual Harassment Guidelines and Educational Employment," Susan Howard, intern, The Project on the Status and Education of Women, AAC, August, 1980, 4 pages.
"Corporate Responsibility in Cases of Sexual Harassment," Terry L. Leap and Edmund R. Gray, *Business Horizons*, October, 1980, 8 pages.
"Interpreting the New Sexual Harassment Guidelines," Michele Hoyman and Ronda Robinson, *Personnel Journal*, December, 1980, 5 pages.
"Harassment on Campus," Marcia Riccardi, *The Boston Globe*, Sunday, December 21, 1980.
"Sexual Harassment: A Hidden Problem," Bernice R. Sandler and Associates, *Educational Record*, Winter, 1981, 6 pages.
"Sexual Harassment: The View from the Top," Claire Sofran, *Redbook*, Vol. 156, No. 5, March, 1981, 7 pages.

Law Review Articles

"Sexual Harassment & Title VII — Female Employees' Claim Alleging Verbal & Physical Advances by a Male Supervisor Dismissed as Nonactionable," *New York University Law Review*, Vol. 51, April 1976, 19 pages.

"Title VII: Legal Protection Against Sexual Harassment," Kerri Weisel, *Washington Law Review*, Vol. 53, 1977, 21 pages.

"Sexual Advances by an Employee's Supervisor: A Sex Discrimination Violation of Title VII?" Gilbert J. Ginsburg and Jean Galloway Koreski, *Employee Relations Law Journal*, Vol. 3, No. 1, 1977, 10 pages.

"Sexual Harassment: Finding a Cause of Action Under Title VII," William Seymour, *Labor Law Journal*, March 1979, 18 pages.

"Legal Remedies for Employment-Related Sexual Harassment," *Minnesota Law Review*, Vol. 64, 1979, 30 pages.

Centers/Groups

National Sexual Harassment Legal Backup Center
Working Women's Institute
593 Park Avenue
New York, New York 10021
(212) 838-4420

Alliance Against Sexual Coercion
P.O. Box 1
Cambridge, Massachusetts 02139
(618) 661-4090

Women Organized Against Sexual Harassment
300 Eshleman Hall
University of California
Berkeley, California 94720

Women Against Sexual Harassment
Arizona State University
c/o Louise Van Bushkirk
568 E. Mesa Vista Lane
Mesa, Arizona 85203

69

Center for Women in Government
SUNYA, Draper Hall
Room 302
1400 Washington Ave.
Albany, New York 12222

Cambridge Women's Center
46 Pleasant Street
Cambridge, Massachusetts 02139

Cleveland Women Working
1258 Euclid Ave.
Cleveland, Ohio 44115

Michigan Task Force on Sexual Harassment in the Workplace
c/o Office of Women and Work
369 N. Washington
P.O. Box 30015
Lansing, Michigan 48909

New Responses, Inc.
Room 402
955 So. Columbus Street
Arlington, Virginia 22204

Sexual Harassment Task Force
Women's Studies Department
California State University
600 J Street
Sacramento, California

Vocations for Social Change
352 Broadway
Cambridge, Massachusetts 02139

Women Organized for Employment
126 Montgomery Street
San Francisco, California 94104

Women Organized for Racial and Economic Equality
542 S. Dearborn, Room 510
Chicago, Illinois 60605

Films/Other Media

"Preventing Sexual Harassment," part of BNAC's *Fair Employment Practice* program, 24 hr. preview for full program, $96.00. Order from BNA Communications Inc., Dept. AFC-022, 9401 Decoverly Hall Rd., Rockville, Maryland 20850, 301-948-0540.

"Stopping Sexual Harassment," a slide presentation as training tool. Order from Bonnie Dimun, Director of Women's Career Information Center, Middlesex County College, Edison, New Jersey 08818, 201-548-6223.

"Workplace Hustle," 16 mm film, $480; ¾" video cassette, $520. Order from Clark Communications, Inc., 943 Howard St., San Francisco, California 94103.

APPENDIX D: LISTING OF SEXUAL HARASSMENT CASES

FEDERAL COURT DECISIONS

DISTRICT OF COLUMBIA CIRCUIT

Williams v. Civiletti, 487 F. Supp. 1387, 22 FEP Cases 1311 (D.D.C. 1980) decision on remand; *Williams v. Bell,* 587 F. 2d 1240, 17 FEP Cases 1662 (D.C. Cir. 1978) reversing and remanding *Williams v. Saxbe,* 413 F. Supp. 654, 12 FEP Cases 1093 (D.D.C. 1976).

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Vinson v. Taylor, 23 FEP Cases 37 (D.D.C. 1980).

1ST CIRCUIT — MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, PUERTO RICO

Fisher v. Flynn, 598 F. 2d 663, 19 FEP Cases 932 (1st Cir. 1979).

2ND CIRCUIT — VERMONT, NEW YORK, CONNECTICUT

EEOC v. Sage Realty Corp., 22 FEP Cases 1660 (S.D. N.Y. 1980).

3RD CIRCUIT — PENNSYLVANIA, NEW JERSEY, DELAWARE, VIRGIN ISLANDS

Tomkins v. Public Service Electric & Gas Co. (PSE&G), 568 F. 2d 1044, 16 FEP Cases 22 (3rd Cir. 1977) reversing *Tomkins v. PSE&G,* 442 F. Supp. 553, 13 FEP Cases 1574 (D.N.J. 1976).

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4TH CIRCUIT — VIRGINIA, WEST VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, MARYLAND

Garber v. Saxon Business Products, Inc., 552 F. 2d 1032, 15 FEP Cases 344 (4th Cir. 1977).

5TH CIRCUIT — TEXAS, LOUISIANA, MISSISSIPPI, ALABAMA, GEORGIA, FLORIDA, CANAL ZONE

6TH CIRCUIT — MICHIGAN, OHIO, KENTUCKY, TENNESSEE

Munford v. James T. Barnes & Co., 441 F. Supp. 459, 17 FEP Cases 107 (E.D. Mich. 1977).

Dacus v. Southern College of Optometry, 22 FEP Cases 241 (W.D. Tenn. 1979).

7TH CIRCUIT — WISCONSIN, ILLINOIS, INDIANA

Ludington v. Sambo's Restaurants, Inc., 474 F. Supp. 480, 20 FEP Cases 1000 (E.D. Wis. 1979).

8TH CIRCUIT — MISSOURI, IOWA, ARKANSAS, NORTH DAKOTA, SOUTH DAKOTA, MINNESOTA, NEBRASKA

9TH CIRCUIT — CALIFORNIA, ARIZONA, NEVADA, WASHINGTON, OREGON, IDAHO, MONTANA, ALASKA, HAWAII, GUAM

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Miller v. Bank of America, 600 F. 2d 211, 20 FEP Cases 462 (9th Cir. 1979) reversing and remanding *Miller v. Bank of America*, 418 F. Supp. 233, 13 FEP Cases 439 (N.D. Cal. 1976).

Rinkel v. Associated Pipeline Contractors, Inc., 17 FEP Cases 224 (D. Alaska 1978).

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10TH CIRCUIT — WYOMING, UTAH, COLORADO, NEW MEXICO, KANSAS, OKLAHOMA

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Brown v. City of Guthrie, 22 FEP Cases (W.D. Okla. 1980).

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Continental Can Co. v. State of Minnesota, 22 FEP Cases 1808 (Minnesota Supreme Court 1980).

FACULTY-STUDENT HARASSMENT

Alexander v. Yale University, 459 F. Supp. 1 (D. Conn. 1977), reversed by *Alexander v. Yale University*, Civil Action No. 77-277 (D. Conn. July 2, 1979), and affirmed No. 79-7547 (2nd Cir. September 22, 1980).

APPENDIX E: EEOC GUIDELINES ON SEXUAL HARASSMENT

Section 1604.11 Sexual harassment.

a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.* Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the records as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer, its agents or supervisory

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*The principles involved here continue to apply to race, color, religion or national origin.

employees, knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer, its agents or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and other legal responsibility which the employer may have with respect to the conduct of such non-employees.

f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

g) Other related practices

Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

These sexual harassment guidelines are one section of the EEOC's Sex Discrimination Guidelines, which are codified as 29 CFR 1604.

Other CUPA Publications

1980-81 Administrative Compensation Survey

College and University Personnel Policy Models

Interview Guide for Supervisors

Retirement: A Time for Fulfillment

Attendees and Attendants: A Guidebook of Helpful Hints

Tenure and Retrenchment Practices in Higher Education: A Technical Report

Women and Minorities in Administration of Higher Education Institutions (available late summer, 1981)

Monograph on Theories of Sex-Based Wage Discrimination (available late summer, 1981)